No. 80-1743

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In The

Supreme Court of the United States

October Term, 1980

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, et al.,

Petitioners,

vs.

THE GUARDIANS ASSOCIATION OF THE NEW YORK CITY POLICE DEPARTMENT, INC. THE HISPANIC SOCIETY OF THE NEW YORK CITY POLICE DEPARTMENT INC., et al.,

Respondents.

AMICUS BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

Amicus is a coalition of six ethnic fraternal organizations of the New York City Police Department, each of which organizations is made up of members who identify themselves as being members of recognized ethnic groups, such as Italian, Greek, Irish, Polish, Jewish and German, and two coordinating

organizations of police and other Civil Service groups. In fact the coalition is comprised of all ethnic fraternal organizations within the New York City Police Department, except that comprising the Blacks, the Asians and the Hispanics, whose members comprise two of the parties who are respondents in this proceeding. Amicus did file a brief in the United States Court of Appeals in this matter last year (2a),[1] and amicus was recently given permission by the United States District Court for the Southern District in New York to participate as amicus in pending litigation involving the validity of the New York City Police Department Sergeants Examination. Other parties in this proceeding have consented to the filing of a brief by amicus.[2]

The purpose of each ethnic fraternal Police Department organization is to preserve the ethnic identity of each group.[3] In that regard each group seeks to promote the cultural aspects of their own group, to promote opportunities for its members, and to protect their legal rights. In addition each seek to protect the opportunities and legal rights of other persons who are so ethnically identified who may wish to qualify for appointment to the Police Department. While the coalition, and its component groups, are each committed to preserving the ethnic identity of its members, each group individually, and the coalition as a whole, is committed to protecting the Civil Service system for examination and appointment so that it complies solely to the standards of merit and fitness, and is opposed to any system in which racial or ethnic factors are allowed to play a role as to the appointment or promotions within the Police Department. More

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1. Appendix reference is to the certiorari petition.

2. Letters to that effect were filed by this counsel with the Clerk of the Court.

3. The list of eight organizations comprising the amicus coalition is set forth at the end of the brief.

particularly each group, and the coalition as a whole, is dedicated to the principle that no particular ethnic group, nor members of any particular ethnic group, should receive a preference over other members solely because of ethnic or racial factors.

In a pluralistic urban setting, such as New York City, numerous ethnic groups are seeking the limited positions on the police force or other Civil Service positions. As such we have a great number of applicants whose ethnic background of a very recent vintage is either Irish, Italian, Polish, German, Greek, Black or Hispanic. For such groups police positions or other Civil Service positions are most attractive. They represent the ladder by which most such members can get out of the ghetto. In New York City the ghetto is not limited solely to that of a Black ghetto or Hispanic ghetto. Across the City we have ethnic communities, which are indeed very modest in terms of income, housing, educational achievements and other relevant factors, which can be considered ghettos. In these communities reside Italians, Irish, Germans, Polish, Greeks and other recent immigrants. As such we are dealing with groups which in one sense or another are all educationally, economically and culturally disadvantaged. We are not talking about an advantaged group over a disadvantaged group. We are talking about applicants, all of whom come from similar economic-social background, who aspire, not to the legal or medical profession, but to be police officers. In this context neither the Blacks nor the Hispanics are relatively disadvantaged. Whatever disadvantage they have, they share with other various ethnic groups. As such there is no reason at all to give preference to one ethnic minority group over another. Amicus does not ask for preferences for itself. It merely asks that all ethnic minorities, be they Greek, Polish, Italian, Black or Hispanic be accorded equal treatment from the law.

ARGUMENT

Several novel and important questions as to the scope of Title VII of the Civil Rights Act are posed by the certiorari application because of the opinion of the Court of Appeals in setting aside both the rank-order selection of qualified candidates and the cut-off scoring method.

After a painstaking analysis the Court of Appeals sustained the validity of the examination in question. It found the examination to be job-related, valid and reliable. The Court of Appeals held that in spite of the fact that the examination produced disparate results amongst Blacks and Hispanics on one hand, and others on the other hand, the City of New York had met its burden of demonstrating that the examination was valid. At that point the task of the Court of Appeals should have ended, and the matter should have been remanded to the District Court for compliance. However in spite of the finding that the examination was valid, nevertheless the Court of Appeals set aside the use of the examination as a basis for appointments because of its novel and theoretical notions with regard to the use of a rank-order selection and cut-off scores.

This Court has never authorized a lower court to set aside some aspect of the use of a competitive examination, after finding that the examination was job-related and valid. No other Court of Appeals of the United States has attempted to do what the Court of Appeals for the Second Circuit has done in this matter, nor has the Congress authorized such action in Title VII of the Civil Rights Act. As such the far reaching nature of the decision of the Court of Appeals really goes beyond the authority of that court to so act. The Court of Appeals and the District Court can act only if there has been a finding that the examination itself was not job-related and not valid. In the absence of such a finding, the Court of Appeals is without authority to so act.

The New York State Civil Service system, with its competitive examination to test for merit and fitness, go back almost one hundred years to the year 1883. *See* the history, as set forth in *Chitdenten v. Wurster,* 152 N.Y. 345, 350-355, 46 N.E. 857 (1897). As such a healthy respect by the federal court for a state statutory system which has been in effect for almost one hundred years should be required. However the Court of Appeals brushed aside a well-established and respected system, without according it due respect.

The thrust of the reported cases to date have been to the effect that where there has been a showing of either actual discrimination, intent to discriminate or unjustifiable disparate results, the Court of Appeals may act accordingly. However where judicial review establishes that there has not been an intent to discriminate, no actual discrimination and that the test is job-related and valid, in spite of disparate results, the task of the federal courts is at an end.

The opinion of the Court of Appeals recognized that employment testing is not primarily a legal subject, and that there are limits to the ability of the judiciary to scrutinize such tests (15a). In spite of that recognition the Court of Appeals then relied upon untested psychological literature to support its contentions, even though there has always been a substantial amount of respected literature in support of the opposite point of view. Almost any theory can have some support in the literature of its profession especially among the academics. However such theories remain just what they are, namely theories, and should not be incorporated into judicial opinions as rules of laws for all to follow. Justice Holmes cautioned us wisely that the "14th amendment did not enact Mr. Herbert Spencer's Social Statics." *Lochner v. New York*, 198 U.S. 45, at 75 (1905). Similarly Title VII was not enacted by the Congress to implement the theories as set forth in footnotes 17-23 of the opinion of the Court of Appeals.

The elimination of rank-order and cut-off scores with regard to a competitive examination which has been found to be valid may well produce a situation where the city may be forced to hire a black applicant with a 91 score over a white applicant with a 99 score. Neither the Congress nor any opinion of this Court have ever desired or mandated such results with regard to a valid and job-related competitive examination.

CONCLUSION

The issues of law posed by the certiorari application are indeed novel and important, and could well have an impact upon competitive Civil Service examinations given throughout the nation. The issues are significantly important to urban areas where we have the presence of various minority groups such as the respondents and the amicus. It is important that this Court clarify the legal situation so that lower courts will know both the extent and limitations of their authority to act.

Respectfully submitted,

H. ELLIOT WALES
*Attorney for Amicus "Coalition"**

* *Fraternal Organizations Comprising Amicus Coalition*

1. Columbia Association, New York City Police Department, Inc.
2. Emerald Society, New York City Police Department, Inc.
3. Pulaski Association, New York City Police Department, Inc.
4. Shomrim Society, New York City Police Department, Inc.
5. St. Paul Society, Eastern Orthodox, New York City Police Dept.,
6. Steuben Association, New York City Police Department, Inc.
7. Council of Jewish Organizations in Civil Service, Inc.
8. National Conference of Shomrim Societies, Inc.